

SERVED: October 27, 1994

NTSB Order No. EA-4267

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 17th day of October, 1994

---

Petition of )

JAMES F. SELBACH, )

for review of the denial by )  
the Administrator of the )  
Federal Aviation Administration )  
of the issuance of an airman )  
medical certificate. )

---

Docket SM-4038

**OPINION AND ORDER**

Petitioner, acting pro se, has appealed from the oral initial decision issued by Administrative Law Judge William E. Fowler, Jr., at the conclusion of an evidentiary hearing held in this matter on July 21, 1993.<sup>1</sup> In that decision, the law judge upheld the FAA's denial of petitioner's application for a third-class medical certificate based on a conclusion that petitioner failed to meet the medical standards set forth in 14 C.F.R.

---

<sup>1</sup> Attached is an excerpt from the hearing transcript containing the oral initial decision.

67.17(d)(1)(ii) and (f)(2).<sup>2</sup> For the reasons discussed below, petitioner's appeal is granted and the initial decision is reversed.

The FAA's final denial, issued to petitioner by the Federal Air Surgeon on November 13, 1992, was based on petitioner's "history of depression under treatment with psychotherapy and

---

<sup>2</sup> Sections 67.17(d)(1)(ii) and (f)(2) provide as follows:

**§67.17 Third-class medical certificate.**

\* \* \*

(d) *Mental and neurologic* -- (1) *Mental*.

\* \* \*

(ii) No other personality disorder, neurosis, or mental condition that the Federal Air Surgeon finds --

(a) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying; or

(b) May reasonably be expected, within 2 years after the finding, to make him unable to perform those duties or exercise those privileges;

and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved.

\* \* \*

(f) *General medical condition*:

\* \* \*

(2) No other organic, functional or structural disease, defect, or limitation that the Federal Air Surgeon finds --

(i) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying; or

(ii) May reasonably be expected, within two years after the finding, to make him unable to perform those duties or exercise those privileges;

and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved.

The Administrator's denial cited similar subsections of sections 67.13 and 67.15, which set forth the medical standards for first- and second-class certification.

psychotropic (Prozac) medication," which was stated to be disqualifying under the regulatory sections cited above. (Exhibit J-1, p. 6.) The Administrator made clear that respondent's use of the medication Prozac and his underlying condition (depression) were both found to be disqualifying conditions,<sup>3</sup> and the parties presented evidence regarding both issues at the hearing. However, in light of the Seventh Circuit's recent decision in Bullwinkel v. FAA and NTSB, No. 93-1803, (7th Cir. April 27, 1994), rehearing denied, (June 23, 1994),<sup>4</sup> holding that section 67.17 cannot be interpreted to prohibit the use of medications, we will limit our review of this case to the FAA's denial of petitioner's application based on his underlying medical condition of depression.<sup>5</sup> As discussed

---

<sup>3</sup> See, pre-denial case review by FAA Chief Psychiatrist (Barton Pakull) indicating that petitioner "should be denied medical certification because of an underlying medical condition that is disqualifying as well as the use of disqualifying medication" (Exhibit J-1 p. 5), and his similar testimony at the hearing (Tr. 208).

<sup>4</sup> The petitioner in Bullwinkel was taking the medication Lithium to control a bipolar disorder. The FAA's denial in that case relied on the same regulatory sections here at issue, and cited petitioner's "history of mood swings, attention deficit disorder and the use of disqualifying medication." Because the Court found that the FAA's "no lithium" rule was not a reasonable interpretation of section 67.17 (which speaks only to medical conditions, not medications), it vacated our decision affirming the FAA's denial and remanded it for consideration of whether petitioner's underlying disorder, standing alone, is disqualifying.

<sup>5</sup> We have often upheld denials of unrestricted medical certificates when maintenance of the petitioner's health is dependent on continued medical attention, or medication requiring periodic monitoring. See e.g., Petition of Vandenberg, 3 NTSB 2880 (1980); Petition of Bruckner, NTSB Order No. EA-3362 (1991); Petition of Walker, NTSB Order No. EA-3504 (1992).

further below, the denial cannot be sustained on this basis.

Petitioner's treating psychiatrist, Donald M. Pirodsky, testified that when petitioner first came to him in November 1991, his primary symptom was a lack of enjoyment for life. The notes of his initial impression indicated that petitioner was a workaholic, had difficulty relaxing, had periods of severe depression lasting a couple of days, exhibited irritable and angry responses and "type A" personality traits, and had trouble with insomnia (petitioner was sleeping about five hours a night).

Nonetheless, Dr. Pirodsky stated that petitioner -- who has a family and a successful law practice -- was fully functional in his everyday life, and expressed doubt that his depression would have been noted by anyone but a skilled clinician.

Dr. Pirodsky diagnosed petitioner as suffering from primary dysthymia, early onset, a condition he described as a chronic mild depressive illness with no discernible cause. Dr. Pirodsky testified that someone with dysthymia usually functions normally in society, and could be considered normal in all respects except for their inability to enjoy life. Dr. Pirodsky testified that he did not think petitioner's ability to fly an aircraft, or to do anything else he wanted to do, would be limited in any way by either his underlying condition or his use of Prozac.

(..continued)

However, the reasoning in those cases rests in part on the premise that the underlying condition, if not controlled, would present an unacceptable risk to aviation safety. Thus, that line of cases is unhelpful to the Administrator unless petitioner's underlying dysthymia is found to present an unacceptable risk to aviation safety.

He testified that if petitioner's dysthymic condition had been left untreated it would merely have continued as a chronic mild depression, manifested primarily by an inability to enjoy life. He admitted the possibility that the condition could worsen, but indicated that he did not think a change in petitioner's condition was likely. Indeed, when he was questioned as to how certain stressful situations -- such as losing a loved one or having business or financial troubles -- would affect petitioner, Dr. Pirodsky testified, "I see him as having good coping skills. I don't think that those events would necessarily warrant a change [in] his treatment plan . . . [or] would necessarily mean that his condition would be exacerbated." (Tr. 114.)

Dr. Pirodsky prescribed the antidepressant fluoxetine (trade name Prozac), and regular psychotherapy to treat petitioner's dysthymia. Petitioner responded very well to the medication, finding that he was able to enjoy life to a degree he had never before experienced. In fact, he testified that his desire to become a pilot was a direct result of this new-found ability to enjoy life. Dr. Pirodsky testified that at one point he attempted to reduce petitioner's dosage of Prozac from 40 milligrams a day, to 20. But when petitioner became "a little irritable, sort of lost his zest for life," he returned him to the higher dosage. (Tr. 69.)

The Administrator presented expert testimony from Dr. Don E. Flinn, a psychiatrist with a background in aviation medicine who

serves as a consultant to the FAA. He concurred with Dr. Pirodsky's description of dysthymia, and characterized it as a minor depression which diminishes one's enjoyment of life but which does not seriously interfere with functioning. He opined, however, that dysthymia may affect a persons's decision-making ability in complex tasks such as piloting an airplane. He differed with Dr. Pirodsky's assessment of whether petitioner's condition was likely to change over time, stating that in his opinion dysthymic persons are "definitely" at increased risk for developing major depression (a more severe and debilitating mood disorder than dysthymia). (Tr. 168, 194-95.) On the other hand, he testified that a dysthymic's condition might also improve.

With regard to the insomnia associated with petitioner's dysthymia,<sup>6</sup> Dr. Flinn commented that the tiredness resulting from this condition could potentially interfere with petitioner's ability to safely pilot an airplane, in that it might affect his information-processing skills. He seemed to concede, however, that this concern could be applicable to any pilot experiencing tiredness, regardless of whether or not they were dysthymic or taking Prozac. (Tr. 167-68.)

In Dr. Flinn's opinion, petitioner was disqualified from airman medical certification based on his history of depression

---

<sup>6</sup> The Administrator suggested that the insomnia might also be due to petitioner's use of Prozac, as that is one of the potential side-effects of that drug. However, petitioner's treating psychiatrist, Dr. Pirodsky, testified that in petitioner's case he felt it more likely was due to the patient's underlying dysthymia than to the Prozac. (Tr. 86.)

under treatment with psychotherapy and Prozac. He emphasized petitioner's use of Prozac, however, as the primary basis for his opinion. (Tr. 181, 186, 200.) When asked whether petitioner's dysthymia alone would disqualify him from certification, Dr. Flinn admitted that he was not familiar enough with the specifics of petitioner's situation to offer an opinion. He indicated generally, however, that some individuals diagnosed with dysthymia would probably be disqualified based on the severity of their condition, but that "there certainly are people who would not be that severe." (Tr. 189.)

The FAA's Chief Psychiatrist, Barton Pakull, maintained that petitioner is disqualified from airman medical certification because of his dysthymia as well as his use of Prozac. (Tr. 208.) However, like Dr. Flinn, he focused primarily on concerns associated with petitioner's use of Prozac, and seemed to concede that his decision to recommend denial of petitioner's application was based exclusively on his use of Prozac. (Tr. 220-21, 229-30.) Indeed, he testified that it was "impossible" to evaluate petitioner's underlying dysthymia while he was taking Prozac, and asserted that the FAA had not yet had the opportunity to do such an evaluation.<sup>7</sup> (Tr. 213.) When asked why he did not ask for a current psychiatric and psychological evaluation or further

---

<sup>7</sup> His only comment on the specific features of petitioner's dysthymia was to speculate that the symptoms which re-emerged when petitioner's dosage of Prozac was decreased (irritability and decreased "zest for life"), "could" have an impact on flight safety by affecting his concentration, memory, or psychomotor coordination. (Tr. 234-35.)

records pertaining to petitioner's underlying condition<sup>8</sup> before making his decision, Dr. Pakull indicated that he felt it would be a waste of petitioner's money since he would have been denied anyway (presumably because of his use of Prozac), and the evaluation would have to be repeated at such time as he was no longer taking Prozac. Dr. Pakull confirmed that dysthymia alone is disqualifying only if it is severe enough to interfere with safe performance as a pilot, and indicated that many people who are depressed are medically certified to fly. (Tr. 209, 232.)

At the time of the hearing, petitioner had been taking Prozac for over 21 months and had experienced no side effects from the drug. Both parties introduced extensive testimony and documentary exhibits regarding the side-effect profile of Prozac, and offered opinions as to the significance of those side-effects to aviation safety, and the likelihood that petitioner would experience any of those effects within the next two years. However, in view of our curtailed review under the Bullwinkel decision, we need not discuss or evaluate that evidence.

The law judge, in upholding the FAA's denial, focused his discussion exclusively on petitioner's use of Prozac, and did not independently address the underlying dysthymia. Because this case does not involve issues such as witness credibility, which are within the exclusive province of the law judge, our decision

---

<sup>8</sup> Section 67.31 authorizes the FAA to seek additional medical information or history whenever it is deemed necessary to determine whether an applicant meets the medical standards in Part 67.



is based on our own evaluation of the record as it relates to petitioner's underlying condition of dysthymia. That review convinces us that petitioner bore his burden of proving that his dysthymia is not disqualifying.

As summarized above, petitioner's treating psychiatrist testified that petitioner's dysthymia would not adversely affect his functioning in any activity he wished to pursue, including piloting an aircraft. In our view, the FAA presented no persuasive testimony or evidence to rebut this showing. Although Dr. Flinn believed that petitioner's dysthymia put him at an increased risk for developing major depression, Dr. Pirodsky thought it unlikely that petitioner's condition would worsen. On this point, we are inclined to give greater weight to the opinion of Dr. Pirodsky, as petitioner's treating psychiatrist, than to the opinion of Dr. Flinn, who admitted he had never met petitioner until the day of the hearing.

The Administrator's experts expressed concern that in some cases dysthymia might adversely affect aviation safety, and thus be disqualifying. However, they did not adequately connect these concerns to anything specific about petitioner's case.<sup>9</sup> We find Dr. Flinn's generalized concern regarding the tiredness associated with petitioner's insomnia to be overly speculative,

---

<sup>9</sup> Language in both regulatory paragraphs cited to support the denial in this case indicates that, in addition to medical judgment about the condition involved, the Federal Air Surgeon's finding of disqualification must be based on the individual applicant's "case history." 14 C.F.R. 67.17(d)(1)(ii) and (f)(2).

and inadequate to support a denial of certification. Similarly, we cannot find Dr. Pakull's speculation regarding potential adverse effects of petitioner's irritability and reduced "zest for life" (which he experienced upon reducing his dosage of Prozac) to be sufficient support for the FAA's denial in this case.

We take particular note of the FAA experts' acknowledgement that dysthymia may or may not be disqualifying (depending on its severity), and Dr. Pakull's acknowledgment that he has no basis on which to determine which category petitioner falls into. The FAA had the right, under section 67.31, to request additional information, such as a psychiatric and psychological evaluation of petitioner's untreated condition, before making a final decision on petitioner's application. If petitioner was unwilling or unable to provide such an evaluation, the FAA would have been justified in withholding issuance pursuant to section 67.31. However, no such evaluation was requested. We decline to uphold the Administrator's denial on the basis that such an evaluation *might* have shown that petitioner's dysthymia is severe enough to be disqualifying.

In sum, we find that petitioner has borne his burden of proving that his dysthymia does not present an unreasonable risk to aviation safety, and should not disqualify him from airman medical certification.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Petitioner's appeal is granted;
2. The initial decision is reversed; and
3. A third-class airman medical certificate shall be issued to petitioner upon his reapplication, provided he is otherwise and fully qualified therefor.<sup>10</sup>

HALL, Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.

---

<sup>10</sup> We express no views as to what additional information the FAA may require from petitioner in connection with its evaluation of such a reapplication.

Regarding petitioner's use of Prozac, we note that the FAA has recently amended its medical standards, in light of the Bullwinkel case, to explicitly include as a basis for disqualification any "medication or other treatment" that, in the Federal Air Surgeon's judgment, "makes the applicant unable to safely perform the duties or exercise the privileges" of the airman certificate held or sought, when such a finding is "based on the case history and appropriate, qualified, medical judgment relating to the medication or other treatment involved." See 59 FR 46706 (September 9, 1994).